No. 352

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

GENERAL MOTORS CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF BETHLEHEM STEEL COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

Bethlehem Steel Company hereby respectfully moves for leave to file a brief *amicus curiae* in this case. The consent of the Attorney for the Petitioner has been obtained. The consent of the Attorney for the Respondent was requested but refused.

The interest of the Bethlehem Steel Company in this case arises from the fact that it has pending before the District of Columbia Tax Court an appeal from a denial of a claim for refund of District of Columbia income and franchise tax for the period from October 1, 1958, to December 31, 1958. In addition, it has filed

claims for refund of such tax with respect to the years 1959 through 1960, and has filed a protest to the proposed assertion of a deficiency in such tax for the year 1961. The appeal filed by Bethlehem Steel Company, the claims for refund and the protest present the same issue as is presented in the instant case.

The Bethlehem Steel Company requests permission to file a brief *amicus curiae* in order to emphasize to the Court the importance of the resolution of the issue raised in the instant case to corporations other than Petitioner.

Respectfully submitted,

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BRIEF OF BETHLEHEM STEEL COMPANY IN SUPPORT OF PETITION FOR CERTIORARI

Bethlehem Steel Company, with leave of the Court, presents this brief in support of the petition for certiorari.

INTEREST OF AMICUS CURIAE

The interest of Bethlehem Steel Company is set forth in the accompanying Motion for Leave to File Brief Amicus Curiae.

ARGUMENT

In *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959), this Court made clear that the several states may tax constitutionally the net income of business enterprises derived exclusively from interstate commerce. In the course of the opinion, it

was several times emphasized that a concomitant of this power to tax was that such income be "fairly apportioned" among the several states. 358 U.S., at 460, 462. The Court explicitly noted that no question was raised in *Northwestern States* concerning the reasonableness of the apportionment formulas then before the Court or their practical operation. 358 U.S., at 452, 463.

Following this Court's decision, many segments of the business community expressed concern that the states would seek to expand their taxing jurisdiction to limits which had not as yet been defined by judicial opinion. Partly in response to this concern, Congress enacted in 1959 Public Law 86-272, 73 Stat. 555 (1959), 15 U.S.C. § 381 (Supp. IV, 1963), which (1) undertook to set forth minimal jurisdictional requirements under which the states could tax purely interstate net income, and (2) directed the appropriate Congressional committees to enter into a comprehensive study of the problems created by state taxation of interstate commerce.*

Fair apportionment among the states of interstate income derived from multistate operations is, of course, a far more serious and pressing problem since this Court's decision in *Northwestern States*. Double taxation is no longer an academic problem; it is now a reality which faces any corporation doing multistate business. It is caused by the growth of state statutes which impose a tax on interstate commerce, and by the

* In response to this statutory directive, a Special Subcommittee of the Committee on the Judiciary, House of Representatives, recently completed and published a Report on State Taxation of Interstate Commerce, H.R. No. 1480, 88th Cong., 2d Sess. (hereinafter referred to as the "House Report.")

many vagaries of apportionment formulas utilized by local taxing authorities. As the House Report stated (p. 118):

> "Not only have there always been wide diversities among the various formulas employed by the States, but the composition of those formulas seems to be constantly changing."

Both the majority and dissenting opinions in *Northwestern States* express the view that it remains the primary obligation of Congress, and not the judicial system, to set precise guidelines for the taxation of interstate commerce. 358 U.S., at 457-58, 476-77. One cannot dispute this conclusion. But it seems equally true that the judicial system—and, at its apex, this Court—cannot stand by in the absence of Congressional action and allow unconstitutional taxation to occur.

We recognize the truth of Mr. Justice Frankfurter's statement:

> "At best, this Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause." 358 U.S., at 476.

It is this essentially negative action—the striking down of those state attempts to tax beyond constitutional bounds—that we ask the Court to undertake in the present case.

The question which petitioner asks this Court to decide is simply this: Does the use by the District of a single factor sales formula—a formula which disregards other elements that this Court has found in other cases to contribute to the making of corporate profit—

create an unconstitutional tax where it has specifically been found by the trier of fact that (1) the same income produced by District sales has been taxed in the state of manufacture by attributing such income to the capital and labor employed in those states, thereby creating double taxation of the same income, and (2) that the income taxed by the District was grossly disproportionate to the activities of petitioner within the District.

Clearly this is not a case where there exists only a fear of disproportionate and double taxation because of the conflicting tax statutes of several jurisdictions; rather, petitioner has laid an ample factual basis for these findings made by the trier of fact.

This Court need go no further than it went more than 30 years ago in *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123 (1931), in order to reverse the judgment of the Court of Appeals for the District of Columbia. In that case, this Court struck down the application of a North Carolina tax which allocated income on the single factor of property within the taxing jurisdiction. This Court found that, "as applied to the appellant's business for the years in question [the tax] operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by appellant in that State." 283 U.S., at 135. An almost identical finding of fact has been made in the present case.

In addition, it has also been found that the same income has in fact been taxed by other jurisdictions—jurisdictions whose apportionment formulas accord more closely with corporate facts of life. The House

Report shows that while only two states in 1929 used apportionment formulas which recognized the joint contributions of property, payroll, and sales in the production of income, 26 states use such formulas today. (See Table 5-7, House Report p. 119.) This growing recognition by the states that fair apportionment demands recognition of several income-producing factors is most significant. This Court quite recently has relied on the evolution of state laws as a benchmark by which to measure a minimum standard of due process. *Mapp* v. *Ohio*, 367 U.S. 643, 651 (1961).

The Court, however, need not go so far as to declare unlawful the use of single factor sales formulas. All the Court need do is recognize that such a formula is at least suspect, because it fails to accord any weight to other elements in the production of income which most taxing jurisdictions have recognized over the years and which this Court specifically has found to be valid. And when such a single-factor formula in fact produces the disproportionate and double taxation which is likely to occur from its use, then—now—it is appropriate for this Court to declare such a tax unlawful.

Bethlehem fully shares the apprehension of petitioner that, if the present judgment is allowed to stand, it will offer an inducement to any state in which all of a taxpayer's customers are located to attempt to tax the entire net income of the taxpayer, regardless of the location of taxpayer's overall operations. The evils of such a situation are obvious: the arbitrary allocation of income surely denies the taxpayer due process, and the balkanization which would occur among the several states defeats the very purpose of the Commerce Clause. Uniformity achieved by Congressional action may be the future hope, but judicial intervention to

protect against unconstitutional burdens must be the present answer.

CONCLUSION

Bethlehem Steel Company joins with petitioner in respectfully urging this Court to grant the petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted,

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